

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRAIG A. SPENCER, et al.	:	CIVIL ACTION
	:	NO. 96-1792
Plaintiffs,	:	
	:	
v.	:	
	:	
MILTON STEINMAN,	:	
	:	
Defendant.	:	

ORDER-MEMORANDUM

**AND NOW**, this **22nd** day of **October, 1998**, following a hearing, and upon consideration of Spencer's motion to strike witnesses (doc. no. 116) and Steinman's response (doc. no. 120), it is hereby **ORDERED** that motion is **GRANTED** for the following reasons:

1. Before the Court is a motion by plaintiffs Craig Spencer, Robert Spencer, and the Arden Group joined by plaintiffs Argus Group 1700, Inc. and Arden Phoenix Group 1700, L.P. ("Spencer parties") to strike defendant Milton Steinman's ("Steinman") supplemental responses to expert interrogatories. In these supplemental responses, dated September 18, 1998, Steinman designated Howard L. Braitman, C.P.A. and Professor Georgette Pointdexter as expert witnesses to be called at trial.<sup>1</sup>

2. The parties in this case have been locked in heated

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<sup>1</sup> These witnesses are authorities in the field of real estate transactions and would testify to "the standards applied to limited partnerships." Steinman's Mem. at 3.

combat through a series of lawsuits before several courts over a period of almost four years. The substance of these complex claims, inter se, have been consolidated before this Court. On November 17, 1997, the Court entered a pretrial scheduling order which set February 17, 1998 as the close of all discovery and March 17, 1998 as the date on which the case would enter the trial pool. (See doc. no. 64.) On February 25, 1998, the Court removed the case from the trial pool to consider dispositive motions that had been filed. (See doc. no. 85.) On September 11, 1998, the Court denied the dispositive motions and specially listed the case for trial on January 12, 1999. (See doc. nos. 113 and 114). At the hearing on September 11, 1998, the parties represented to the Court that no additional discovery was needed, and agreed that trial would begin on January 11, 1999. (Tr. 9/11/98 at 51-53.)

3. The Spencer parties contend that Steinman's identification of these two experts is out of time and that the late designation causes them prejudice. Steinman responds that in light of the January 12, 1999 trial date, and in the absence of a court order specifying a cut-off date for the designation of experts, the designation of additional expert witnesses is well within the 90 day period prior to the commencement of trial provided for by Federal Rule of Civil Procedure 26(a)(2)(C).<sup>2</sup>

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<sup>2</sup> The Rule provides:  
[Disclosure of expert witnesses] shall be made at the

4. The Court disagrees with Steinman. The Court, by Order of November 11, 1997, set the trial pool date as March 17, 1998. Under the mandate of Rule 26(a)(2)(C), in the absence of any court order to the contrary, the parties were required to disclose the identity of experts at least 90 days in advance of that date. Fed. R. Civ. P. 26(a)(2)(C). This, Steinman did not do. The fact that the Court subsequently removed the case from the trial pool, and re-set the case for a later date, did not re-open the window for expert designation provided by Rule 26(a)(2)(C). Rule 26(a)(2)(C) is one of default intended to insure minimal fairness by providing "that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." Fed. R. Civ. P. 26(a)(2) Committee Note (1993 amendments). See also Hyun v. South Kent School, No. 95-2235, 1997 WL 597122 (D. Conn. Sep 17, 1997) (quoting Sylla-Sawdon v. Uniroyal Goodrich Tire Co., 47 F.3d 277, 284 (8th Cir. 1995) ("Compliance with Rule 26 is necessary for 'the elimination of unfair surprise to the opposing party and the conservation of resources.'")). Therefore, the twin objectives promoted by the Rule, fairness to litigants and order in the litigation process,

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times and in the sequence directed by the court. In the absence of other directs from the court or stipulation of the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial . . . .  
Fed. R. Civ. P. 26(a)(2)(C).

would be undermined if, in the absence of specific direction from the court, the window for the designation of experts was reopened automatically each time the court, for whatever reason, rescheduled trial for a later date.

5. The Court, however, will construe Steinman's opposition to the motion as a motion for leave to identify out of time additional expert witnesses.

6. In Myers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 904-05 (3d Cir. 1977), overruled on other grounds, Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), the Third Circuit set forth certain factors to be considered when determining whether the testimony of a witness also who was designated or named out of time should be excluded:

(1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or wilfulness in failing to comply with the district court's order.

Id. In applying the Myers factors to the exclusion of an expert witness who has been designated after the time to do so has expired, the court should consider that:

The exclusion of otherwise admissible expert witness testimony for failure to meet the timing requirements of a court order is an extreme measure. A pre-trial scheduling order is not intended to be a straightjacket restricting complete exploration of a party's claims. It is, however, an important tool for the court's effective management of a complex case. The court's ability to exclude undisclosed witnesses in compliance with a pretrial order is essential to avoid unnecessary

expense or delay.

Perkasie Industries Corp. v. Advance Transformer, Inc., 143

F.R.D. 73, 75 (E.D. Pa. 1992) (applying Myers to a request to preclude testimony of an expert witness).

7. Applying the Myers factors to this case, the Court finds that the disruptive effect that permitting Steinman to name two additional expert witnesses at this late date would have on the administration of justice and on the efficient trial of this case would be great. Were the Court to grant Steinman's request, fairness would necessitate affording the Spencer parties an opportunity to depose the newly designated expert witnesses, to name additional counter expert witnesses of their own, and, if necessary, to conduct additional discovery. This would result in the re-setting of the specially listed trial date which was established with the consent of the parties.

8. Nor has Steinman articulated a good reason why the two witnesses were not designated earlier. Steinman candidly acknowledges that the additional expert witnesses would address the issues which have been in the case since the filing of the initial pleadings. Steinman further acknowledges he did not retain the experts at an earlier date because he did not want to incur the additional expense until after the dispositive motions were ruled on by the Court. The Court finds that the justification proffered for the late disclosure is not persuasive, and to accept it unfairly shifts the inconvenience

and expense associated with the late disclosure from Steinman to the Spencer parties and to the Court.

9. Finally, greater prejudice would result to the Spencer parties by the granting of the request than would inure to Steinman by this denial. Naming additional experts after the dispositive motions were extensively briefed and argued would allow Steinman's experts to offer opinions based on a preview of the evidence which was not available at the time to the Spencer parties' experts. On the other hand, because Steinman has already designated an expert witness on the general subject as to which the additional experts would opine,<sup>3</sup> Steinman would not be without expert testimony at trial.

10. The Court thus concludes that the Myers factors weigh in favor of denying Steinman's request for leave to designate additional expert witnesses out of time.

**AND IT IS SO ORDERED.**

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EDUARDO C. ROBRENO, J.

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<sup>3</sup> Steinman has already designated Mr. Frank Jones, a former IRS agent, as an expert on the sources and uses of partnership funds. Steinman's Mem. at 2.